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## When Courts Shouldn't Take the Initiative: Section 2 of the Voting Rights Act, Initiative Petitions, and *Operation King's Dream*

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# NOTE

## WHEN COURTS SHOULDN'T TAKE THE INITIATIVE: SECTION 2 OF THE VOTING RIGHTS ACT, INITIATIVE PETITIONS, AND *OPERATION KING'S DREAM*

Francesca Ambrosio\*

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### INTRODUCTION

Well after the end of the Civil War, the abolition of slavery, and the passage of the Fifteenth Amendment, many African Americans were still unable to effectively exercise their right to vote.<sup>1</sup> Finally, in 1965, Congress sought to remedy this situation by passing the Voting Rights Act (“VRA”).<sup>2</sup> The bill was dramatic and controversial, but commentators hail it as one of the most

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1. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 228 (2003).

2. 42 U.S.C. § 1973 (2000).

effective pieces of legislation of the civil rights movement.<sup>3</sup> It codified the Fifteenth Amendment and gave Congress a means of enforcing its guarantees. As amended, section 2(a) of the VRA provides that

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .<sup>4</sup>

The main purpose of the legislation was to ensure not only that all citizens had a nominal right to vote, but that they had the ability to make their vote effective.<sup>5</sup> The VRA has substantially achieved that purpose. The number of minority voters increased dramatically after its passage,<sup>6</sup> and while voting discrimination<sup>7</sup> still exists, the wholesale exclusion of an entire segment of the American population is no longer an issue.

Although few have quarreled with the purpose or success of the VRA, the means used to achieve its goals have been controversial and widely disputed. Some critics have questioned the constitutionality of such sweeping legislation,<sup>8</sup> yet the Supreme Court has repeatedly upheld its constitutionality,<sup>9</sup> and the recent congressional renewal of various sections of the VRA suggests that it is here to stay.<sup>10</sup> Much of the controversy surrounding the VRA stems from difficulties in determining its exact scope. As the proportion of minorities in America increases, so does their inherent voting strength; yet recent years have seen an expansion of the application and scope of the VRA, along with a parallel increase in attempts to curtail its use.<sup>11</sup>

For example, in several recent cases plaintiffs have argued that sections of the VRA—such as the section 4 minority language requirement—should

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3. Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 52, 52 (Bernard Grofman & Chandler Davidson eds., 1992).

4. 42 U.S.C. § 1973(a).

5. See S. REP. NO. 97-417, at 5 (1982).

6. See James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 449 (1999) ("By 1996, there were more than 250 black legislators in the eleven southern states, thirty-nine black members of Congress, and more than 8,200 blacks elected to political office nationwide.").

7. For the purposes of this paper, "voting discrimination" means attempts to exclude eligible voters from the electoral process on the basis of race, sex, or any other pejorative classification.

8. See Pitts, *supra* note 1, at 225.

9. See *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Georgia v. United States*, 411 U.S. 526, 541 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

10. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

11. See *Holder v. Hall*, 512 U.S. 874, 891-946 (1994) (Thomas, J., concurring) (arguing for a break with *stare decisis* to give an interpretation to section 2 that is more consistent with the text of the Act and that does not require judicial policymaking).

apply to the petition circulation process for initiatives.<sup>12</sup> The idea of applying section 2 of the VRA to the petition process seems unorthodox—the VRA specifically applies to *voting* and no voting occurs during this phase—and courts have struggled with how to address the dilemma.<sup>13</sup> In determining the scope of section 2, the question then becomes: when the text conflicts with the underlying purpose of the VRA, which controls? Thus far, three circuits have held that the text controls and that various sections of the VRA do not pertain to the petition circulation phase of an initiative.<sup>14</sup> In fact, only one case, *Operation King's Dream v. Connerly*,<sup>15</sup> has applied the VRA to the petition phase of an initiative.

The facts of *Operation King's Dream* contain no technical violation of the VRA, yet the alleged behavior may conflict with the ideal democratic processes the VRA sought to establish. The case arose after the Michigan Civil Rights Initiative ("MCRI"), a ballot question committee,<sup>16</sup> proposed Proposal 2 to amend the state constitution to prohibit preferences on the basis of race, sex, or national origin in hiring or admission decisions at public institutions.<sup>17</sup> Proposal 2 was controversial from the outset,<sup>18</sup> and after the election committee approved the petition, but well before the election, allegations emerged that some petition circulators had fraudulently represented the purpose of the initiative in order to obtain signatures.<sup>19</sup> Opponents of the initiative filed suit. Rather than alleging common law fraud or a violation of

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12. *Padilla v. Lever (Padilla I)*, 463 F.3d 1046 (9th Cir. 2006) (dismissing challenge to a referendum petition that was not bilingual, pursuant to the requirements of section 203(c) of the VRA which requires that jurisdictions with a certain percentage of minority-language speakers print bilingual ballots); *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) (dismissing challenge to an initiative petition that was not bilingual pursuant to the requirements of section 203(c) of the VRA); *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988) (same); *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006) (allowing application of section 2 of the VRA to an initiative petition based on allegations of fraud).

13. *Compare Padilla v. Lever (Padilla I)*, 429 F.3d 910 (9th Cir. 2005) (holding that the bilingual requirement of the VRA applies to a recall petition), *withdrawn en banc*, 446 F.3d 963, (9th Cir. 2006), *with Padilla II*, 463 F.3d at 1050-53 (holding that the bilingual requirement of the VRA does not apply to a referendum petition).

14. *Padilla II*, 463 F.3d 1046; *Montero*, 861 F.2d 603; *Delgado*, 861 F.2d 1489.

15. 2006 WL 2514115, at \*17 (holding that the VRA applied to the acts of the Michigan petition circulators, but allowing the initiative to remain on the ballot because the evidence of fraud did not indicate that it was racially targeted). The issue of whether section 2 of the VRA applies to initiative petitions is currently on appeal to the Sixth Circuit Court of Appeals.

16. MICH. COMP. LAWS § 169.202(3) (2004) ("‘Ballot question committee’ means a committee acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question but that does not receive contributions or make expenditures or contributions for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate.”).

17. Mich. Civil Rights Initiative Comm., *Actual Ballot Language* (2006), <http://www.michigancivilrights.org/media/Actual%20Ballot%20Language.pdf>.

18. *See generally* Opposition of Defendants-Appellees Connerly, Gratz, and Michigan Civil Rights Initiative Committee to Plaintiff's Motion for a Preliminary Injunction Pending Appeal at 1–8, *Operation King's Dream v. Connerly*, No. 06-2144 (6th Cir. Sept. 7, 2006) (providing a summary of the prior state and federal court litigation).

19. *Id.* at 5.

state election laws, they sought to apply section 2 to the initiative process based on the theory that racially-targeted fraud during the circulation process would spill over into racially-targeted fraud at the ballot.<sup>20</sup> Because Congress intended the VRA to protect the right to vote, the plaintiffs argued it should cover anything that hinders that right at any stage of the process.<sup>21</sup> Under this view, evidence of racially targeted fraud with the potential to deny or abridge a citizen's right to vote is sufficient to find a violation of section 2, regardless of where in the election process the fraud occurs.<sup>22</sup>

Despite their appealing policy considerations, these legal arguments for expanding the scope of section 2 are tenuous at best. This Note argues that interpreting section 2 to exclude initiative proposals during their circulation phase is the only way to avoid insurmountable statutory construction problems and constitutional objections. It grounds the theoretical discussion of the VRA in an analysis of how the court applied section 2 in *Operation King's Dream*. Part I provides the legal landscape of a section 2 claim, including relevant legislative history and the essential elements of a successful claim. Part II contends that because no voting takes place during the petition phase of a proposal, petition circulation can neither deny nor abridge the right to vote. Part III argues that interpreting section 2 so that it applies to acts of private citizens would eliminate the state action requirement, thus rendering section 2 unconstitutional.<sup>23</sup>

## I. BACKGROUND OF SECTION 2 OF THE VRA

This Part begins with an overview of the historical landscape at the time of the passage of the VRA and the basic means the VRA employed to remedy the situation. Section I.B then traces the major statutory and legal developments of the VRA since its enactment. Finally, Section I.C lays out how the court in *Operation King's Dream* applied this legal analysis to a situation involving initiative petitions.

### A. History and Purpose Behind the Voting Rights Act

After the ratification of the Fifteenth Amendment, many southern states used devices such as poll taxes and literacy tests to disenfranchise black

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20. Plaintiff's Brief in Support of Their Motion for a Preliminary Injunction at 1–2, *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006).

21. *Id.*

22. See *id.* at 24–25. This argument is largely one of semantics; the real difficulty lies in defining exactly when the “election process” begins. Those arguing to extend the scope of section 2 would define the election process as beginning when an initiative petition is first drafted and circulated, while those who argue in favor of a narrower interpretation would define the election process as beginning once the initiative gains access to the ballot. See *infra* Section II.A.2.a.

23. There are other serious constitutional implications arising from an extension of section 2, such as freedom of speech and federalism. Both present compelling arguments for limiting the scope of section 2, but a full analysis is beyond the scope of this Note.

voters.<sup>24</sup> Because the southern states controlled Congress for much of the period before the passage of the Voting Rights Act, Congress did little to stop this disenfranchisement and enforce the guarantees of the Fifteenth Amendment.<sup>25</sup> Eventually, however, perhaps galvanized by the Supreme Court's progressive one-person, one-vote cases<sup>26</sup> and by mounting racial tension over voter registration in the South,<sup>27</sup> Congress passed the Voting Rights Act in 1965.<sup>28</sup> The Supreme Court hailed the VRA as a means to confront the "insidious and pervasive evil which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution."<sup>29</sup>

The VRA pursued its objective of ensuring that no citizen's right to vote would be "denied or abridged" on account of race or color<sup>30</sup> by eliminating the use of literary tests and other devices often used to disenfranchise minorities,<sup>31</sup> and by requiring all "covered" jurisdictions<sup>32</sup> to obtain "preclearance" from the Department of Justice ("DOJ") before making any change in a voting practice or procedure. Three sections of the Voting Rights Act have emerged as the primary vehicles for enforcing the guarantees of the Fifteenth Amendment. Section 2 applies nationally, its language closely tracking that of the Fifteenth Amendment.<sup>33</sup> Section 2 cases are analyzed in terms of "vote dilution"—a violation occurs if the challenged standard, practice, or procedure dilutes the efficacy of a vote because of the voter's race.<sup>34</sup> Section 4 "suspended the use of particular exclusionary practices such as literacy tests."<sup>35</sup> Section 5 required that "covered" jurisdictions—those jurisdictions with extremely low minority voter turnout—seek federal preclearance in order to change any voting practices.<sup>36</sup>

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24. QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 3 (Chandler Davidson & Bernard Grofman eds., 1994).

25. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 546 (rev. 2d ed. 2002).

26. Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. REV. 749, 765 (2006).

27. See ISSACHAROFF ET AL., *supra* note 25, at 547.

28. 42 U.S.C. § 1973 (2000).

29. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (upholding the VRA against constitutional attack).

30. 42 U.S.C. § 1973(a) ("Section 2" vote dilution).

31. 42 U.S.C. § 1973(b) ("Section 4" minority language provision).

32. 42 U.S.C. § 1973(c) ("Section 5" preclearance requirement).

33. Ellen Katz with Margaret Aisenbrey et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 646 (2006).

34. See Tucker, *supra* note 6, at 535–36.

35. Katz with Aisenbrey et al., *supra* note 33, at 646.

36. 42 U.S.C. § 1973(c).

*B. The 1982 Amendments and the Supreme Court's Application  
of the New Section 2*

The VRA had an immediate and dramatic effect, but it took time for litigants to decide which sections of the VRA would best serve their goals. The Act achieved its primary purpose of assuring equal access to the electoral process for all citizens, but concerns that blacks were unable to impact elections to the same extent as whites remained.<sup>37</sup> These concerns led citizens of Mobile, Alabama, to file a lawsuit challenging the at-large city council electoral system under section 2 of the VRA.<sup>38</sup> The Supreme Court denied relief, holding that plaintiffs must prove discriminatory intent in order to prevail under section 2.<sup>39</sup> For all practical purposes, this case, *City of Mobile v. Bolden*, silenced further section 2 vote-dilution litigation.<sup>40</sup>

Congress responded to *Bolden* in 1982 and amended section 2 to prohibit voting practices or procedures that “resulted in a denial of equal electoral opportunity, regardless of . . . intent.”<sup>41</sup> Congress implemented the change primarily to make it easier for plaintiffs, who often could not establish proof of discriminatory intent,<sup>42</sup> to show that certain practices or procedures “diluted” the effectiveness of their vote. Amended section 2(a) reads as follows:

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .<sup>43</sup>

As a preliminary matter, a case brought under section 2 of the VRA must allege that a “[s]tate or political subdivision” denied or abridged the right to vote.<sup>44</sup> Section 2 is violated if

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>45</sup>

By removing the intent requirement, the amendments revived section 2 as a viable means of enforcing the goals of the VRA.

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37. Katz with Aisenbrey et al., *supra* note 33, at 647.

38. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

39. *Id.* at 70.

40. ISSACHAROFF ET AL., *supra* note 25, at 746.

41. *Id.* at 747.

42. See *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).

43. 42 U.S.C. § 1973(a) (2000).

44. *Id.*

45. 42 U.S.C. § 1973(b).

The Supreme Court first addressed the 1982 amendments in *Thornburg v. Gingles*,<sup>46</sup> in which it established three preconditions that typically must be satisfied before a section 2 claim can proceed to adjudication on the merits.<sup>47</sup> The minority group challenging the practice must establish that (1) it is sufficiently large and geographically compact to constitute a majority in a district; (2) it is “politically cohesive”; and (3) the “white majority votes sufficiently as a bloc” so that it usually defeats the minority’s preferred candidate.<sup>48</sup>

In a typical section 2 case, after the *Gingles* factors are satisfied, courts evaluate the “totality of the circumstances” to determine if vote dilution occurred and if the challenged procedure caused the vote dilution.<sup>49</sup> A Senate Judiciary Committee report (“Senate Report”) accompanying the 1982 amendments identifies several factors (“the Senate Factors”) for courts to consider when determining if the totality of the circumstances reveal a violation of section 2.<sup>50</sup> The Supreme Court has described the Senate Report as the “authoritative source” on the meaning of the statute.<sup>51</sup> While the Senate developed these factors specifically for section 2 violations, other relevant factors are sometimes considered and “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”<sup>52</sup> Ultimately, no firm criteria exist for establishing a violation of section 2; rather, “the question whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality.’”<sup>53</sup>

For section 2 cases in which the *Gingles* and Senate Factors are not readily applicable<sup>54</sup>—such as the initiative petition process—courts have looked to policy considerations for answers. The *Gingles* and Senate Factors

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46. 478 U.S. 30 (1986) (addressing challenge by black voters in North Carolina of a state-wide redistricting plan, particularly the use of multimember districts).

47. *Id.* at 50–51.

48. *Id.*

49. See *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594–95 (9th Cir. 1997) (challenging voter-registration procedure).

50. S. REP. NO. 97-417, at 28–29 (1982). The Senate Factors include: (1) a history of official discrimination that impacted the right of minority members to participate in the political process; (2) the extent to which voting in the elections is racially polarized; (3) the extent to which the state has used “voting practices or procedures that may enhance the opportunity for discrimination against the minority group”; (4) exclusion from access to slating process; (5) the extent to which impacted minorities bear the effects of discrimination in areas such as education, employment, or health, which might hinder their ability to participate in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minorities have been elected to office in the jurisdiction; (8) a lack of responsiveness on the part of elected officials to the particular needs of the minority group; and (9) whether the justification for the challenged policy is “tenuous.” *Id.*

51. See *Gingles*, 478 U.S. at 43 n.7.

52. *Id.* at 45 (quoting S. REP. NO. 97-417, at 29).

53. *Id.* (quoting S. REP. NO. 97-417, at 30).

54. Such cases are infrequent. See Katz with Aisenbrey et al., *supra* note 33, at 660 (noting that of 331 section 2 lawsuits filed since the 1982 amendments, only fourteen plaintiffs have prevailed without addressing them).



aid courts in identifying instances of direct vote dilution, such as redistricting.<sup>55</sup> Beyond these “vote dilution through submergence” claims,<sup>56</sup> there are section 2 cases that do not implicate the *Gingles* or Senate Factors because the discriminatory aspect is indirect. These occasional cases challenge procedures such as voter roll purges,<sup>57</sup> felon disenfranchisement,<sup>58</sup> and annexation.<sup>59</sup> It is in these cases that the statutory language and underlying policy considerations become particularly relevant because the impact on minority voters is a secondary effect of the challenged practice. Supreme Court cases dealing with challenges to electoral practices other than redistricting “illuminate[] . . . important doctrinal, practical, and theoretical issues.”<sup>60</sup> Claims extending section 2 to the initiative petition process would be of the sort that requires courts to consider these issues because any impact on voting would be indirect. Though it is acceptable for courts in these situations to take policy concerns under consideration, policy alone is not enough to contradict the text of section 2.

### C. *Operation King's Dream*

*Operation King's Dream* is one such case in which the *Gingles* and Senate Factors did not readily apply, but where the court reached out to bring the case within the scope of section 2. The plain language of section 2 requires a plaintiff to show that the organization attempting to place the initiative on the ballot engaged in some activity that would result in less access to the political process for minorities. Applying the requirements of a section 2 claim to an initiative petition, as in *Operation King's Dream*, rests on the premise that the proposition could not get on the ballot without the use of racially targeted fraud, and so the only way to remove the taint of fraud is to remove the proposition from the ballot.<sup>61</sup> In *Operation King's Dream*, the plaintiffs alleged that the MCRI hired petition circulators who fraudulently targeted black voters by telling them that the petition was “for affirmative action” or “for civil rights.”<sup>62</sup> They further alleged that black signatures were essential to obtain white signatures, and thus to ultimately

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55. ISSACHAROFF ET AL., *supra* note 25, at 833.

56. *Gingles*, 478 U.S. at 48. The Court used the phrase to refer to a claim that a multimember system “dilutes [minority] votes by submerging them in a white majority.” *Id.* at 46.

57. *Ortiz v. City of Philadelphia Office of City Comm’rs Voter Registration Div.*, 28 F.3d 306 (3d Cir. 1994) (challenging Pennsylvania’s voter registration purge policy).

58. *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (challenging Florida’s felon disenfranchisement policy).

59. *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999) (challenging a housing authority’s decision not to annex an African-American dominated housing project to the city).

60. ISSACHAROFF ET AL., *supra* note 25, at 833.

61. See Plaintiff’s Brief in Support of Their Motion for a Preliminary Injunction at 2, *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006).

62. See *id.* at 6.

place the petition on the ballot.<sup>63</sup> Accordingly, they argued that the only way to remove the taint of fraud was to remove the proposition from the ballot. The court in *Operation King's Dream* agreed with this reasoning, though it ultimately held that the plaintiffs lacked the necessary evidence of racially targeted fraud to sustain their claim under the VRA.<sup>64</sup> While this logic persuaded the court, applying section 2 in this manner is inconsistent with the plain language of the statute and the constitutional principles on which it relies.

## II. PETITION CIRCULATION DOES NOT IMPLICATE VOTING

This Part argues that section 2 should not apply to citizen initiative petition circulation for two fundamental reasons. Section II.A contends that initiative petitions fail to implicate voting, the very action section 2 was enacted to protect. Section II.B argues that, even if a court were to apply section 2 to an initiative petition, a workable benchmark against which to compare a person's current ability to vote does not exist in initiative petition cases.

### A. Circulating a Petition Does Not Fit the Definition of Voting

This Section argues that signing a petition does not constitute "voting" under section 2 of the VRA. The VRA defines the act of voting to include (1) all prerequisites to voting, (2) casting of a ballot, and (3) the counting of a ballot.<sup>65</sup> Section II.A.1 contends that because petition circulation does not fall into any of these three defined phases of voting, the VRA does not cover it. Section II.A.2 maintains that section 2 of the VRA does not cover initiative petitions even considering a broader view of voting,<sup>66</sup> because courts should understand the electoral process to begin only once citizens successfully place the initiative on the ballot.

#### 1. Narrow Definition of Voting

Signing a petition cannot be interpreted as part of the first phase of voting—a prerequisite to voting—because it is not a requirement to voting in the ultimate election. Because the VRA limits "voting" to those actions pertinent

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63. *Id.* at 2.

64. *Operation King's Dream*, 2006 WL 2514115, at \*17.

65. 42 U.S.C. § 1971(e) (2000) ("[T]he word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election . . ."). While the statutory definition of "vote" is not limited to these three aspects of voting, Section II.A.2 will show that an expanded definition of voting would not alter the analysis.

66. See 42 U.S.C. § 1973(b) stating that section 2 is violated where "the *political processes* leading to nomination or election in the State or political subdivision are not equally open to participation") (emphasis added).

to registering a choice in an election,<sup>67</sup> prerequisites to voting “must be interpreted to be those [actions] which relate directly to the casting of a ballot.”<sup>68</sup> Registration requirements, age qualifications, and other traditional prerequisites to voting are just that—*pre-voting* requirements. There is no parallel requirement to sign a petition before voting on the resulting initiative, and supporting a petition during circulation does not require voting for it at an election. Moreover, a state could not make signing a petition a prerequisite to voting on the initiative once it is on the ballot, because “[a] state cannot impede or diminish [the initiative] process so long as it reserves the right of initiative to the people.”<sup>69</sup> Requiring circulators to offer all people who might later vote on the initiative the opportunity to sign a petition would impede the ability of private citizens to exercise their right to legislate through initiatives. It follows that there is an inherent limit on the amount of regulation a state can impose.

Signing a petition is distinct from the second phase of voting—casting a ballot—because the latter involves irreversibly choosing between alternatives, whereas the former does not eliminate alternatives from the ultimate election. The VRA definition of voting,<sup>70</sup> as well as its meaning within the legal vernacular,<sup>71</sup> implies a choice. At an election each voter finally<sup>72</sup> chooses between often mutually exclusive alternatives, thereby exhausting his or her civil right to vote in that election. The circulation of a petition does not involve the same final choice between alternatives and therefore should not implicate VRA rights. By necessity, a petition must precede a vote on an initiative; hence they are two separate acts.<sup>73</sup> While a petition may place an unpalatable initiative on the ballot, it does not deny the right to vote in and of itself.<sup>74</sup>

Critics of this argument frequently point to the fact that petition circulation does present the citizen with a choice between two alternatives—namely, the choice to sign or the choice not to sign.<sup>75</sup> Although that is true, it

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67. 42 U.S.C. § 1971(e).

68. *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988).

69. *Delgado v. Smith*, 861 F.2d 1489, 1496 (11th Cir. 1988).

70. *Montero*, 861 F.2d at 607 (“Implicit in . . . the statutory . . . definition[] of the concept of voting is the presence of a choice to be made.”).

71. BLACK’S LAW DICTIONARY 1606 (8th ed. 2004) (defining a vote as “[t]he expression of one’s preference or opinion”).

72. In an election, the result is final even if the election is only a primary election. This is because the primary will not be re-held. The winner will move on to the ultimate election and all other choices will be removed from the ballot. The election may not decide the final winner of the election, but the result is final in the irreversible sense of the word.

73. *Montero*, 861 F.2d at 607.

74. See *Duke v. Cleland*, 954 F.2d 1526, 1531 (11th Cir. 1992) (holding that decision to exclude candidate’s name from Republican primary did not deny appellant’s right to vote, despite limiting the choices that would appear on the ballot).

75. *Padilla v. Lever (Padilla I)*, 429 F.3d 910, 921 (9th Cir. 2005), *withdrawn en banc*, 446 F.3d 963 (9th Cir. 2006); *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at \*13 (E.D. Mich. Aug. 29, 2006).

is not a *meaningful* choice when compared to the choices presented to voters in casting a ballot. The individual's choice to sign or not to sign is unlikely to have a direct impact on the ultimate success of an initiative.<sup>76</sup> If an individual chooses to sign, the initiative is one step closer to gaining access to the ballot. If not, the petition circulator can simply move on to another person. The relatively low signature requirements to place an initiative on a ballot,<sup>77</sup> compared to the number of votes that will ultimately be required for a proposal to pass at an election,<sup>78</sup> make an individual's refusal to sign a petition a small hurdle to getting an initiative on the ballot.

For the same reasons, the VRA's guarantee that each vote will be counted<sup>79</sup> does not apply to initiative petitions. A signature on a petition is not a vote. Without a vote to be counted, the VRA cannot apply.

## 2. Broad Definition of Voting

Even under a broader reading, section 2 of the VRA does not appropriately encompass initiative petitions. In contrast to the narrow reading, the language of section 2 can also be read to include the entire "electoral process"<sup>80</sup> and all "standards, practices, or procedures"<sup>81</sup> with respect to voting. Section II.A.2.a argues that the only workable definition of "electoral process" is one that does not begin until *after* an initiative has been placed on the ballot, thus excluding initiative petition circulation. Section II.A.2.b shows that the circulation of an initiative petition cannot properly be characterized as a "standard, practice or procedure" with respect to voting.

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76. Cf. *Montero*, 861 F.2d at 607 (arguing those who are opposed to an initiative have no recourse other than to not sign the petition or to speak out against it, and there is not formal means to register opposition). Thus, an individual's refusal to sign a petition will only prevent the placement of an initiative on the ballot if an overwhelming majority of citizens refuse to sign. To get the required number of signatures, only three percent of the Michigan population would need to sign the petition. Only 317,757 signatures were required. See *Opposition of Defendants-Appellees Connerly, Gratz, and Michigan Civil Rights Initiative Committee to Plaintiff's Motion for a Preliminary Injunction Pending Appeal at 6, Operation King's Dream v. Connerly*, No. 06-2144 (6th Cir. Sept. 7, 2006) as a population of 10,120,860. U.S. Census Bureau, Michigan QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/26000.html> (last visited, 2007).

77. MICH. CONST. art. XII, § 2 (requiring signatures equal in number to ten percent of the total vote cast for governor in the preceding election).

78. For example, MCRI was required to obtain 317,757 signatures in order to get Proposal 2 on the ballot, and they received over 508,000 signatures. See *Opposition of Defendants-Appellees Connerly, Gratz, and Michigan Civil Rights Initiative Committee to Plaintiffs' Motion for a Preliminary Injunction Pending Appeal at 5-6, Operation King's Dream v. Connerly*, No. 06-2144 (6th Cir. Sept. 7, 2006). 2,137,574 votes were cast in favor of Proposal 2 on November 7, 2006 (with 1,552,459 votes against the Proposition). CNN.com, 6: Key Ballot Measures, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (last visited, Apr. 14, 2007).

79. 42 U.S.C. § 1971(e) (2000).

80. 42 U.S.C. § 1973(b) (stating that section 2 is violated when "the *political processes* leading to nomination or election in the State or political subdivision are not equally open to participation") (emphasis added).

81. 42 U.S.C. § 1973(a) ("No voting qualification or prerequisite to voting *or* standard, practice, or procedure shall be imposed or applied . . .") (emphasis added).

a. *Circulating a Petition is Not a Part of the Electoral Process*

Legal precedent and legislative history support an interpretation of the electoral process that begins after an initiative has been placed on the ballot. Despite its broad language, “[s]ection 2 does not prohibit all voting restrictions that may have a racially disproportionate effect.”<sup>82</sup> While the definition of “electoral process” is unsettled, the majority of courts interpreting the VRA have refused to extend coverage to processes not clearly related to the casting of a ballot.<sup>83</sup> Since an initiative is not yet on a ballot, petition circulation cannot properly be considered a phase of the electoral process.<sup>84</sup> Administrative interpretations of the VRA also support excluding petitions from section 2 coverage.<sup>85</sup> The DOJ interpretations of the VRA specifically mention petitions in respect to section 5 but not in respect to section 2, suggesting that the DOJ was cognizant of the role petitions play in the electoral process but chose not to address them in the context of section 2.<sup>86</sup> The recent renewal of certain portions of the VRA in 2006<sup>87</sup> also provided both Congress and the DOJ an opportunity to comment on the extent to which petition circulation should be covered by the requirements of the VRA. Given the recent difficulty of the Ninth Circuit in determining how to fit petitions into the VRA,<sup>88</sup> both the DOJ and Congress must have been aware of the ambiguity, and had ample opportunity to clarify its scope.<sup>89</sup>

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82. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (“Congress amended § 2 of the Voting Rights Act to make clear that *certain* practices and procedures that result in the denial or abridgment of the right to vote are forbidden . . .” (quoting *Chisom v. Roemer*, 501 U.S. 380, 383 (1991))).

83. See, e.g., *Padilla v. Lever (Padilla I)*, 463 F.3d 1046, 1052 (9th Cir. 2006); *Delgado v. Smith*, 861 F.2d 1489, 1497 (11th Cir. 1988) (citing *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988)) (holding that the electoral process does not begin until the Secretary of State certifies that the initiative is qualified for placement on the ballot).

84. See *Montero*, 861 F.2d at 606–07.

85. While it is unnecessary to look to advisory opinions when congressional intent is clear, it is appropriate to look to them for guidance when congressional intent is unclear, as it is in regards to the exact scope of the electoral process. See *infra* Section II.A.2.b for a discussion of the improper use of DOJ interpretations when congressional intent is clear.

86. See 28 C.F.R. § 51.13(j) (2006) (providing that “[a]ny change affecting the necessity of or methods for offering issues and propositions for approval by referendum” would be covered under section 5’s preclearance requirement); *id.* § 51.55 (failing to mention petitions in the context of section 2).

87. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

88. Compare *Padilla v. Lever (Padilla I)*, 429 F.3d 910, *withdrawn en banc*, 446 F.3d 963 (9th Cir. 2006) (holding that the bilingual requirement of the VRA applies to a recall petition) with *Padilla II*, 463 F.3d 1046 (holding that the bilingual requirement of the VRA does not apply to a referendum petition).

89. See WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 290–91 (2d ed. 2006) (discussing the “reenactment rule” of statutory construction which says that if Congress reenacts legislation that the Supreme Court has interpreted without changing the text then Congress is said to have ratified the Court’s interpretation of the statute).

Critics argue that the legislative history to the 1982 amendments support a more expansive view of the electoral process which would include initiative petitions. The phrase “electoral process,” when read to give effect to the remedial nature of the statute,<sup>90</sup> might tempt one to include any process that bears even a tenuous connection to the electoral process. The legislative history to the 1982 amendments makes clear that Congress intended section 2 to apply to anything that would deny equal access at *any phase* of the electoral process.<sup>91</sup> The Senate Report refers to section 2 as the “major statutory prohibition of all voting rights discrimination,”<sup>92</sup> designed to eliminate practices that “result in the denial of equal access to any phase of the electoral process for minority group members.”<sup>93</sup>

Yet the injuries alleged in initiative petition cases such as *Operation King's Dream* are not the vote dilution injuries Congress designed section 2 to guard against. A typical vote dilution case involves redistricting that dilutes the voting strength of a minority bloc, making it practically impossible for minorities in that district to have their electoral voice heard.<sup>94</sup> Defining the electoral process as beginning after the initiative is on the ballot ensures that section 2 will only be used to redress injuries against which it was designed to protect. Once the initiative is on the ballot, there will be a vote on the initiative, and it is at this time that section 2 is needed to ensure against racial discrimination. Assuming section 2 is effective at the election, minorities will have an equal opportunity to make themselves heard at that time, nullifying any discrimination that might have occurred previously.

b. *Circulating a Petition is Not a “Standard, Practice, or Procedure” with Respect to Voting*

Section 2 of the VRA protects against “denial or abridgement of the right . . . to vote,” and it does so by prohibiting the imposition of any “standard, practice, or procedure” that would cause such a result.<sup>95</sup> As with the phrase “electoral process,” no statute defines the phrase “standard, practice, or procedure.” Both judicial interpretations and interpretations by the DOJ, however, suggest that the circulation of an initiative petition is not a “standard, practice, or procedure” that has the ability to deny or abridge the right to vote.

The Supreme Court's interpretation of the phrase “standard, practice, or procedure” precludes any interpretation that would include petition circulation. The Court first addressed this phrase in the context of a section 5

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90. See *supra* Section I.A.

91. S. REP. NO. 97-417, at 30 (1982).

92. *Id.*

94. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

95. 42 U.S.C. § 1973(a) (2000).

challenge in *Allen v. State Board of Elections*.<sup>96</sup> The Court later identified four typologies that the phrase “standards, practices, or procedures” can represent.<sup>97</sup> The four typologies are (1) changes that involve the manner of voting, (2) changes that involve candidacy requirements and qualifications, (3) “changes in the composition of the electorate that may vote for candidates for a given office,” and (4) changes that create or abolish an elective office.<sup>98</sup> Although *Allen* was a section 5 case, it references the legislative history of section 2,<sup>99</sup> suggesting that the interpretation of this phrase can be applied to the identical language in section 2. Since circulating a petition cannot properly be described as fitting into any of these four categories, it does not fall within the Supreme Court’s interpretation of a “standard, practice, or procedure” in the context of the VRA.

Paradoxically, those who argue that section 2 includes petition circulation within its scope often cite *Allen* in support of their position.<sup>100</sup> This cross-application of *Allen* exists because jurists widely understand *Allen* to stand for the proposition that courts should broadly interpret the VRA in order to effectuate its remedial purposes.<sup>101</sup> Those in favor of including petition circulation within the scope of section 2 emphasize that in *Allen*, the Court held that the phrase “standard, practice, or procedure” should be interpreted to cover discrimination in all procedures that affect the ballot’s contents, including signature requirements for primary elections.<sup>102</sup> Consequently they claim that because the circulation of a petition is necessary to trigger a vote on the initiative,<sup>103</sup> the standards, practices, and procedures used to circulate a petition should be considered parallel to the nomination process,<sup>104</sup> a process to which the VRA applies.<sup>105</sup>

This reliance on an expansive reading of *Allen* is misguided, however, because initiative petition signature requirements do not fit into any of the

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96. 393 U.S. 544 (1969) (deciding four separate cases and interpreting whether the changes involved were “standards, practices, or procedures” subject to the preclearance requirement).

97. See *Presley v. Etowah County Comm’n*, 502 U.S. 491, 502 (1992) (holding that section 5 does not cover changes other than changes in the rules governing voting). The Court noted that these four typologies are not necessarily exhaustive, *id.*, but later cases have all fallen into these four factual contexts.

98. *Id.* at 502–03.

99. *Allen*, 393 U.S. at 566–67.

100. *Montero v. Meyer*, 861 F.2d 603, 608 (10th Cir. 1988); *Delgado v. Smith*, 861 F.2d 1489, 1492 (11th Cir. 1988).

101. See *Allen*, 393 U.S. at 565–66.

102. See Plaintiff’s Brief in Support of Their Motion for a Preliminary Injunction at 17, *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006).

103. *Padilla v. Lever (Padilla II)*, 463 F.3d 1046, 1052–53 (9th Cir. 2006). See generally, Plaintiff’s Brief in Support of Their Motion for a Preliminary Injunction, *Operation King’s Dream*, 2006 WL 2514115.

104. *Delgado*, 861 F.2d at 1498 (Anderson, J., dissenting) (“The nomination petition in *Allen* was a stage in the electoral process comparable to the petition process in this case.”).

105. *Morse v. Republican Party of Va.*, 517 U.S. 186, 206 (1996). For a full discussion of the implications from *Morse*, see *infra* Section III.C.

four typologies on which *Allen* relied. While the Court in *Allen* did not specifically note which of the four typologies the increased signature requirement would be classified in, it would most likely be the second typology—"changes that involve candidacy requirements and qualifications"—because a candidate is now required to gather more signatures before gaining access to the ballot.<sup>106</sup> This second typology refers specifically to requirements for candidacy and as such would not apply to requirements for initiative petitions. Because initiative petition requirements cannot fit into any of the other three typologies, initiative petition circulation is not a "standard, practice, or procedure" under *Allen*.

Furthermore, the intrinsic differences between petition circulations and primary elections<sup>107</sup> preclude application of *Allen* to initiative petition circulation. Petitions have binary outcomes—they either succeed in placing a particular initiative on the ballot, or they do not. Thus, voters may ultimately have the opportunity to support or disagree with the initiative, provided that such opportunity is contingent upon a successful petition process. With either outcome, the ability to cast an effective vote is uninhibited. Conversely, primary elections result in the nomination of one candidate at the exclusion of all others. A citizen's ability to vote in a later election is thus constructively inhibited in that choices that were previously available to him have now been eliminated.

Some of the DOJ's interpretations of the VRA have referenced petitions, but these interpretations conflict with the plain meaning of the statute. Some courts have mistakenly treated the DOJ's interpretations as authoritative,<sup>108</sup> but such reliance neglects the Supreme Court's holding that administrative interpretations should be given deference only when Congressional intent is unclear.<sup>109</sup> In *Presley v. Etowah County Commission*, the Court refused to follow the Attorney General's interpretations of section 5's "standard, practice, or procedure" language because the statute itself expressly limits coverage to changes in rules governing voting.<sup>110</sup> The court held that section 5 was "unambiguous with respect to the question whether it covers changes other than changes in rules governing voting,"<sup>111</sup> but left open questions pertaining to particular rules.<sup>112</sup> While the sections of the Act are different, the language is identical, and the plain language of the statute unambiguously shows that section 2 refers only to rules governing voting. Thus, deference to administrative interpretations is unnecessary.

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106. See *Allen*, 393 U.S. at 570.

107. For further discussion on the distinction between primaries and initiative petitions, see *infra* Section III.C.

108. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178–79 (1985) (holding that changes in election dates without preclearance were a violation of section 5).

109. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

110. 502 U.S. 491 (1992).

111. *Id.* at 509.

112. *Id.*



Even if one were to look to the interpretations of the DOJ for guidance, the interpretations themselves are not perfectly clear. For example, the DOJ understood the preclearance and minority language requirements to apply to petitions,<sup>113</sup> but also stated that section 5 does *not* apply to the conduct of political campaigns.<sup>114</sup> When the DOJ discusses purely procedural matters such as the font, language, and size of the ballot, it also interprets the requirements to apply to petitions.<sup>115</sup> However, when it addresses content as opposed to form—such as with political campaign conduct—the DOJ asserts that the VRA does *not* apply.<sup>116</sup> Petition circulation is analogically similar to political campaign conduct (that is to say it implicates content-based issues, not format based issues) since both are aimed at achieving a result in an election—whether it be electing a particular candidate or passing a particular initiative.

### B. Section 2 Benchmark Requirement Is Not Satisfied

Assuming a court were to find that an initiative petition did implicate voting, the next obstacle it would encounter would be to determine a workable benchmark against which to compare a person's current ability to vote. In so doing, a court would look to section 5 of the VRA because courts have evaluated section 2 and section 5 in much the same way and often look to jurisprudence on one to help inform a decision on the other.<sup>117</sup> Both section 2 and section 5 have a benchmark requirement, or a baseline against which the challenged practice will be compared. Courts must analyze section 5 to determine if a challenged practice is "retrogressive," or will undermine minority voting power.<sup>118</sup> The benchmark under this standard is clear: a proposed change is measured against the existing voting method to determine if adopting the change would result in retrogression.<sup>119</sup> Unlike section 5, however, a section 2 case has no pre-existing benchmark. As the term vote dilution suggests, section 2 requires a "norm with respect to which the fact

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113. 28 C.F.R. § 51.13(j) (2006) (applying preclearance requirement to petitions); *id.* § 55.19 (applying minority language provision to petitions).

114. 28 C.F.R. § 51.7.

115. 28 C.F.R. § 51.13(j) (applying preclearance requirement to petitions); *id.* § 55.19 (applying minority language provision to petitions).

116. *See* 28 C.F.R. §§ 51.13(j), 55.19.

117. The Supreme Court has said that the coverage of section 2 and section 5 is the same, *Chisom v. Roemer*, 501 U.S. 380, 401–02 (1991), but the scope of each is not always parallel, *Holder v. Hall*, 512 U.S. 874, 883 (1994). The *Holder* Court reasoned that although the "standard, practice, or procedure" language of section 2 is identical to that used in section 5, the analysis under each is different because section 5 applies only to covered jurisdictions, and to proposed changes in voting procedures within covered jurisdictions. *Holder*, 512 U.S. at 883. Section 2 applies nationally and vote dilution claims are analyzed under the *Gingles* factors and the totality of the circumstances test. *See Gingles*, 478 U.S. at 50–51.

118. *Georgia v. Ashcroft*, 539 U.S. 461, 479–85 (2003) (holding that the proper inquiry to determine if there has been a violation of section 5 is a retrogression analysis).

119. *Holder*, 512 U.S. at 883.

of dilution may be ascertained.”<sup>120</sup> Although the goal of section 2 is to ensure equal access to participation, this is not the norm, and it is highly improbable that a state of affairs will ever exist where each person has identical access to the political process.<sup>121</sup> Thus, unlike a section 5 claim where there is always a pre-defined benchmark to be used in the retrogression analysis, “a benchmark does not exist by definition in § 2 dilution cases.”<sup>122</sup> A court hearing a section 2 suit “must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.”<sup>123</sup> This search is usually unproblematic because most section 2 cases deal with re-districting, in which case the efficacy of the minorities’ vote in the old district can be used as the benchmark. However, in those cases “where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.”<sup>124</sup>

Initiative petition circulation is “inherently standardless,” and as a result cannot satisfy the section 2 benchmark requirement.<sup>125</sup> The court in *Operation King’s Dream* did not specifically address the benchmark requirement, nor was an appropriate benchmark suggested by the plaintiffs. Although endless possible benchmarks can be imagined,<sup>126</sup> “it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place.”<sup>127</sup> Further, the mere existence of a conceivable benchmark in *Operation King’s Dream* provides no reason to believe that it would affect *vote dilution* concerns. Requiring circulators to present every citizen with an opportunity to sign a petition would make initiative petitions impractical and unrealistic. Setting up petition signing booths would seem to nullify the need for an ultimate election. Because no discernable benchmark exists against which courts can analyze claims of vote dilution in petition circulation cases, section 2 claims brought to challenge petitions must fail.

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120. *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (quoting *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J., dissenting from summary affirmation)).

121. For example, those who are close to a polling station, or those who do not need to work, will have an easier time getting to the polls and will be more likely to vote as a result.

122. *Holder*, 512 U.S. at 884.

123. *Id.* at 880.

124. *Id.* at 881.

125. *See id.* at 889 (O’Connor, J., concurring).

126. For example, circulators could be required to go door-to-door and present the petition to every citizen, or there could be designated petition booths where citizens can go in and sign the petition if they desire.

127. *Holder*, 512 U.S. at 882.

### III. THERE IS NO STATE ACTION IN THE PETITION CIRCULATION PROCESS

The VRA applies only to states and political subdivisions of states.<sup>128</sup> As such, discrimination by private citizens is not a VRA violation.<sup>129</sup> This Part argues that challenges to petition circulation do not meet the state action requirement of the VRA for three reasons. Section III.A argues that individuals involved in a petition circulation process are private citizens and the VRA therefore does not apply to them. Section III.B demonstrates that, although state statutes regulate the petition process, the state involvement is ministerial in nature and cannot be characterized as state action. Finally, Section III.C contends that, while some courts interpret state action to cover the actions of private citizens during the political nomination process, the nomination process and the petition circulation process are sufficiently distinct to bar a parallel application of the reasoning applied in those circumstances.

#### A. Private Citizens Are Not State Actors

Actions by private citizens are not actions of the state, and therefore do not constitute state action.<sup>130</sup> The right to initiate legislation through the petition circulation process is a right expressly reserved to citizens in the state constitution.<sup>131</sup> The VRA prohibits certain actions "imposed or applied by any State or political subdivision,"<sup>132</sup> but has no parallel prohibition for private action.

Courts have held the phrase "state or political subdivision" does not pertain to private individuals acting in the course of private political campaigns.<sup>133</sup> Because private citizens running for state office are not covered by the VRA,

128. 42 U.S.C. § 1973(a) (2000) (applying only to a "State or political subdivision").

129. See *United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (holding that the Violence Against Women Act (VAWA) is unconstitutional because it applies to private citizens, and distinguishing VAWA from the VRA because the VRA only applies to states and state officials while VAWA applies nationally).

130. See *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 192 n.11 (1999) ("Nothing in this opinion should be read to suggest that initiative-petition circulators are agents of the State. Although circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls, . . . circulators act on behalf of themselves or the proponents of ballot initiatives.") (citation omitted).

131. See, e.g., MICH. CONST. art. XII, § 2; COLO. CONST. art. V, § 1; see also *Meyer v. Grant*, 486 U.S. 414, 424–25 (1988) (stating that because the right to initiative remains reserved to the people, the state cannot diminish or impede that process); *Montero v. Meyer*, 861 F.2d 603, 609 (10th Cir. 1988) (clarifying that when you circulate a petition you exercise an individual right solely for yourself, not for the state).

132. 42 U.S.C. § 1973(a).

133. See, e.g., *Welch v. McKenzie*, 765 F.2d 1311, 1316 (5th Cir. 1985) (holding that fraud committed against black voters did not violate the VRA because the "fraudulent acts causing the deprivation were committed by [a white candidate] and his supporters, not by the county registrar . . . . Because Section 2 only affords redress for voting practices 'imposed or applied by any State or political subdivision,' [the white candidate's] chicanery is not a Voting Rights Act infringement.").

private citizens circulating petitions should not be covered. The conduct of private citizens during political campaigns has at least as much impact on the election as the conduct of petition circulators.<sup>134</sup> If courts are unwilling to ignore the state action requirement in the one context, there is no argument for why they should ignore it in the initiative petition context. Further, the clear statement rule of statutory construction counsels against interpreting a statute in a manner that will significantly alter the balance between federal and state governments on issues of fundamental rights or policies.<sup>135</sup> To argue that private citizens are state actors requires interpreting a state's *granting* of authority to circulate petitions as *transforming* private citizens into state actors. Private citizens circulating petitions are acting on their own behalf and not for the state. While many states authorize private citizens to seek signatures for proposed initiatives, citizens are "not state officials or employees" and do "not act with the aid of or together with state officials or employees in soliciting signatures" and so do not act under color of state authority.<sup>136</sup>

### B. Actions By State Officials Are Ministerial in Nature

Ministerial actions by state officials do not constitute state action because the state official lacks discretion.<sup>137</sup> The majority of courts hold that when state officials certify petitions for circulation, approve signatures, and place petitions on ballots, their actions are ministerial in nature and therefore do not amount to state action.<sup>138</sup> State involvement is best described as regulatory, designed to ensure that the initiative process is fair and impartial.<sup>139</sup> Despite state involvement, petition circulators retain authority, as

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134. See *Coleman v. Bd. of Educ.*, 990 F. Supp. 221, 232 (S.D.N.Y. 1997) (holding that letters and phone calls warning voters that voting for minority candidates would decrease property values and hurt education did not state a claim under section 2 because they were not implemented by an official state actor). To compare this "racially targeted fraud" with the statements of the MCRI petition circulators, see *supra* Section I.C.

135. *ESKRIDGE ET AL.*, *supra* note 89, at 367–75. Extending section 2 of the VRA to include petition circulators would alter the balance between federal and state governments by radically extending the range of activities which could transform a private citizen into a state actor.

136. *Fred Meyer, Inc. v. Casey*, 781 F. Supp. 1511, 1515 (D. Or. 1992) (denying relief in a § 1983 action brought against private-citizen petition circulators because they were not state actors).

137. *Montero v. Meyer*, 861 F.2d 603, 609–10 (10th Cir. 1988); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (holding that state regulation is insufficient to convert private action into state action).

138. See, e.g., *Padilla v. Lever (Padilla II)*, 463 F.3d 1046, 1051 (9th Cir. 2006); *Montero*, 861 F.2d at 609–10 (holding that despite the fact that state actors performed some ministerial actions in preparing the petition for circulation, the right to circulate a petition was reserved by law for the people and those who did so were not acting pursuant to authority); *Delgado v. Smith*, 861 F.2d 1489, 1495–97 (11th Cir. 1988) (holding that since the right to petition was reserved for the people, the ministerial duties of state officials could not bring the distribution of the petition under the scope of the VRA). But see *Padilla v. Lever (Padilla I)*, 429 F.3d 910, 924 (9th Cir. 2005), *withdrawn en banc*, 446 F.3d 963 (9th Cir. 2006); *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at \*15 (E.D. Mich. Aug. 29, 2006) (holding that such actions by state officials are sufficient to satisfy the state action requirement of section 2).

139. *Montero*, 861 F.2d at 610.

evidenced by the fact that they could withdraw their initiative from public consideration at any time prior to ballot certification without state approval.<sup>140</sup>

State officials' acts are also ministerial because they do not pertain to the *substance* of the petition, but merely its form.<sup>141</sup> Because states do not judge petitions' substantive merit, they do not approve or endorse the content or the behavior of the circulators during the circulation process.<sup>142</sup> Even cases like *Montero v. Meyer*<sup>143</sup> and *Delgado v. Smith*,<sup>144</sup> which involved the content of the petition, held that the state action requirement of the VRA was not fulfilled. In contrast, Massachusetts's treatment of initiative petitions provides an example of government involvement in an initiative petition which could amount to state action. Massachusetts prints initiative petitions, provides them to its electorate, and pays for the cost of printing.<sup>145</sup> The Court in *Delgado* used the level of involvement by Massachusetts's government as a primary means of distinguishing the petition at issue in the case, which had not been paid for or provided by the government.<sup>146</sup> Thus, absent involvement by the state in either the content or the funding of the petition, state involvement does not transform the acts of private citizens into state actors.

Although the *Operation King's Dream* court recently concluded that private citizens circulating an initiative petition were acting under color of state law,<sup>147</sup> the court conflated political participation with state action. The court held that the state action came not from the ministerial acts of state officials, but rather from the notion that circulating a petition to get an initiative on the ballot transformed the circulators into part of the "political machinery" of the state.<sup>148</sup> As part of the "political machinery," the court held, petition circulators are precluded from relying on their status as a private association to deny that they engaged in state action under the VRA.<sup>149</sup>

Characterizing private citizens who circulate petitions as "part of the state's political machinery for choosing which issues would be placed on the

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140. *Id.* at 609.

141. See MICH. COMP. LAWS §§ 168.471 to 168.482 (1979); see also *Duke v. Cleland*, 783 F. Supp. 600, 604–05 (N.D. Ga. 1992) (finding no state action and denying a preliminary injunction where the state printed election ballots according to a list provided by the political party, because the state neither approved nor endorsed the actions of the political party).

142. *Delgado*, 861 F.2d at 1497 ("The state does not . . . address the merits of the proposal . . . . Rather, all of this action is taken by private citizens.").

143. 861 F.2d at 610.

144. 861 F.2d at 1496.

145. MASS. CONST. amend. art. XLVIII, pt. 2, § 3.

146. *Delgado*, 861 F.2d at 1497 n.7 (finding no section 2 violation because the acts of private citizens could not trigger state action, while suggesting that there could be state action in other situations, like the government involvement in Massachusetts).

147. *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at \*15 (E.D. Mich. Aug. 29, 2006).

148. *Id.*

149. *Id.*

state's general election ballot"<sup>150</sup> is flawed because all citizens can be involved in choosing which issues will be on the ballot. If casting a ballot is involvement in the "political machinery," all voters would be state actors—a result the court could not have intended. Registered voters have the opportunity to influence issues in an election through candidate nominations, primary elections, signing petitions, town meetings, and various other means. In this sense, all voters act as part of the "state's political machinery." An interpretation of state action that includes all voters eliminates any distinction between state and private action. Even if this "political machinery" theory is plausible, the White Primary cases the court relied upon involved facts that are easily distinguishable from an initiative petition circulation<sup>151</sup> and were decided prior to the enactment of the VRA, so they cannot be relied upon to properly interpret the VRA's state action requirement.

### C. Distinguishing Nomination and Initiative Petitions

Petition circulators are distinguishable from the political party nomination process, which is considered state action, because the outcome of petition circulation is fundamentally different. This distinction is critical to maintaining that state action does not apply to the actions of petition circulators. In *Morse v. Republican Party of Virginia*,<sup>152</sup> the Supreme Court held that the actions of *private citizens* during the party primary constituted state action. By extending state action to the decisions of a political party, *Morse* significantly expanded the state action doctrine in VRA cases.<sup>153</sup> At issue in *Morse* was the implementation of a thirty-five dollar registration fee necessary to attend the state convention, a change from the previous year for which the Republican Party did not seek preclearance.<sup>154</sup> Because Virginia *automatically* puts candidates nominated by the Republican and Democratic parties on the ballot,<sup>155</sup> the Court concluded that in deciding who would be on the general election ballot the parties were acting under the authority of Virginia.<sup>156</sup>

The outcome of *Morse* was largely based on concerns raised in a series of cases collectively known as the White Primary Cases.<sup>157</sup> The White Primary cases sought to address the fact that although black citizens could vote in the general election, this right was essentially nullified by white citizens

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150. *Id.*

151. *See infra* Section III.C.

152. 517 U.S. 186 (1996).

153. *See id.* at 276 (Thomas, J., dissenting).

154. *See generally id.* at 190–92 (Kennedy, J., judgment of the Court) (plurality opinion).

155. This is different from independents or other candidates who have to declare candidacy and demonstrate support through a nominating petition. *Id.* at 195–96.

156. *Id.* at 197.

157. *Id.* at 199 (referring to one of the White Primary Cases to aid in the Court's reasoning).

excluding blacks from the primaries, thus ensuring that only candidates preferred by whites gained access to the ballot.<sup>158</sup> The first case to address the issue struck down a Texas statute that made primaries open only to whites.<sup>159</sup> The Texas legislature responded by passing a statute permitting political party executive committees to determine who would be eligible to vote in their primaries, and the Democratic party decided to exclude nonwhites from their primary.<sup>160</sup> The Supreme Court held the Texas statute unconstitutional on the theory that exclusionary decisions of an executive committee are quintessentially governmental in nature, and the Court thus rendered the parties agents of the state.<sup>161</sup> Texas subsequently responded with a new statute that allowed state primary conventions to determine party membership.<sup>162</sup> The Supreme Court struck down this statute as well, holding that the Fifteenth Amendment ban on discrimination applies to private associations:

If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary.<sup>163</sup>

While these cases all pre-date the VRA, they provide useful examples of the types of systematic discrimination that the VRA sought to redress.

Petition circulation, however, is distinct from the analysis in *Morse*. First, the impact that a political party primary has on the election is necessarily different than the impact of an initiative circulation. The various nomination and primary elections held by political parties ultimately yield *one* candidate whose name appears on the ballot. Excluding one segment of the population from the nominating process could result in their first choice being excluded from the ballot.<sup>164</sup> This problem does not arise when circulating an initiative or referendum petition. If a person is denied a chance to sign the petition, or if he is confused by what he is signing, *both* options

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158. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grove v. Townsend*, 295 U.S. 45 (1935). These cases are collectively referred to as the White Primary cases.

159. *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (invalidating Texas statute prohibiting blacks from voting in primary elections).

160. *Nixon v. Condon*, 286 U.S. 73, 82 (1932).

161. *Id.* at 88–89 (holding that a political party's executive committee becomes a state actor when a state legislature gives it a power that is independent from the will of the entire party).

162. *Smith*, 321 U.S. at 658 (describing the reenactment of the Texas statute).

163. *Id.* at 664, 666 (overruling *Grove*, 295 U.S. 45 (1935)); see also *Terry*, 345 U.S. at 469–70 (striking down use of "Jaybird" primaries prior to the general party primaries).

164. For example, if black citizens are excluded from the Democratic presidential primaries, they will have no say regarding which Democrat appears on the ballot in the ultimate presidential election. Thus, a Democratic candidate who is sympathetic to the concerns of black citizens could be eliminated during the primaries, making the candidate who does appear on the final ballot less appealing to black Democrats than might otherwise have been the case.

(yes or no) will still be presented to the voter on the day of the election. Thus, any analogy between primaries and petitions is inadequate because exclusion from one eliminates potential choices while exclusion from the other does not.

Second, state involvement in the two processes is sufficiently distinguishable such that private citizens engaged in a constitutionally protected right to enact legislation through initiative petitions should not be considered state actors. Many courts interpret the White Primary cases and *Morse* to hold that "when a State prescribes an election process that gives a *special role* to *political parties*, it 'endorses, adopts and enforces the discrimination.'"<sup>165</sup> States that have ballot initiatives also have standard procedures that private citizens must follow in order to place an initiative on the ballot in an election. Because states apply the procedures categorically, and because they grant no exceptions, the imprimatur of the State is absent. Without the imprimatur of the state as in *Morse*, there is no state action.<sup>166</sup>

### CONCLUSION

Despite the good intentions of the court in *Operation King's Dream*, the court erred in applying section 2 of the VRA to the initiative petition process. Section 2 of the VRA cannot apply to petition circulation because the statute was not designed to deal with procedures outside of the electoral process. Additionally, the actions of petition circulators are the actions of private citizens, and thus lack the necessary state action to violate the VRA.

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165. Cal. Democratic Party v. Jones, 530 U.S. 567, 573 (2000) (emphasis added) (holding that California's blanket primary violated political parties' right of association).

166. See *id.* at 572–73.



